THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 27.09.2007

+ **OMP 414/2005**

M/S ENGINEERING DEVELOPMENT CORPORATION. .... PETITIONER

- versus -

MUNICIPAL CORPORATION OF DELHI. RESPONDENT

Advocates who appeared in this case:
For the Petitioner : Ms Anusuya Salwan
For the Respondents : Ms Smita Shankar

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J (ORAL)

1. By way of this petition objections have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 to the Award dated 27.10.2005. According to the petitioner the award needs to be set aside in respect of claim Nos. 2, 4 and part of claim No. 6. It is contended that the award in respect of these claims is in conflict with the public policy of India.

2. The petitioner was required to construct Community Toilets under the Yamuna Action Plan at different dates in Shakurpur, Delhi. An agreement No EE (Br-IV)/TC/2001-2002/266 was entered into between the petitioner and the respondent for the said project. As per the agreement, the work was to commence on 6.10.2001 and was to be completed by 5.4.2002. By virtue of a corrigendum dated 4.7.2001 by the respondent, it was provided that 1% bonus would be allowed if the work is completed one month in advance and ½% bonus if the work is completed two weeks before the stipulated period. According to the petitioner, the work was completed on 4.3.2002 which was more than one month prior to the stipulated completion date of 5.4.2002. Consequently, it is the petitioner's case that the petitioner became entitled to the 1% bonus indicated in the above-mentioned corrigendum. Claim No. 2 is in respect of payment on account of this incentive bonus for early completion of the work and is to the extent of Rs 1,44,669/-. Claim No. 4, which is also the subject matter of the present petition, is to the extent of Rs 9.04 lakhs and is on account of the watch and ward staff which the petitioner had to maintain during the period 4.3.2002 till 30.10.2002. It is the claim of the petitioner that although the work had

been completed on 4.3.2002, the respondent was not taking over the sites and as a result of which the petitioner had to engage watch and ward staff right upto 30.10.2002, when the said sites were ultimately taken over by the respondent. Claim No. 6 pertains to the claim of interest. The present petition is limited to the question of interest which was not granted by the learned arbitrator. In respect of pendent lite and future interest, the learned arbitrator has awarded interest at the rate of 10% per annum, with which the petitioner has no grievance.

3. The learned counsel for the petitioner submitted that the claim for incentive has been disallowed to the petitioner by ignoring admitted documents, namely Exts. P-6, P-7 and P-8 which were letters written by the petitioner to the respondent wherein it is clearly stated that the work had been completed on 4.3.2002. The learned counsel for the petitioner also submitted that the fourth/final bill was submitted on 4.3.2002 and no further bill for any further work had been submitted by the petitioner. In fact, she submits that there has been no work done on the project after 4.3.2002 and there is no evidence to show that any work at all was done after 4.3.2002. According to the learned counsel for the petitioner, the arbitrator in rejecting the claim No. 2, has committed a patent illegality

and, therefore, his award is opposed to public policy. She submitted that if important documents are ignored then it would amount to legal misconduct on the part of the arbitrator which would definitely be opposed to public policy. She placed reliance on two decisions of the Supreme Court in ***K.P. Poulose v. State of Kerala and another:*** ***AIR 1975 SC 1259*** and ***Union of India v. Pundarikakshudu and Sons and Another:*** ***(2003) 8 SCC 168***, which go to show that where documents are ignored by an arbitrator, it could be held that he was guilty of legal misconduct. Of course, these decisions are rendered in respect of the Arbitration Act, 1940. However, the principles would be equally applicable.

4. As regards Claim No. 4, the learned counsel again referred to Ext. P-6, P-7 and P-8 to indicate that the petitioner was repeatedly asking the respondent to take charge of the sites and that the petitioner be released of the burden of maintaining the watch and ward staff at the earliest. Despite such repeated reminders, the respondent was not taking charge of the sites and, therefore, this resulted in the petitioner's incurring a huge amount on account of maintaining watch and ward sites staff at the sites. This claim has also been rejected by the learned

arbitrator. According to the learned counsel for the petitioner the learned arbitrator has completely ignored the said Exts. P-6, P-7 and P-8 and has completely misconstrued the provisions of the agreement between the petitioner and the respondent.

5. As regards the claim of pre-suit interest, the learned counsel for the petitioner referred to the award and submitted that the learned arbitrator held that the claimant had, at no occasion, issued any written notice to the respondent about claiming interest on their due amount and, therefore, no pre-suit interest was found admissible to the petitioner/claimant. He submitted with reference to Ext. P-6, which is a letter written on 18.6.2002, that there is a clear reference in that letter that interest would be charged @ 24% compounded quarterly for all delayed payments and damages. The learned counsel, therefore, submitted that the award is contrary to the records and the rejection by the learned arbitrator of the claim for pre-suit interest is also liable to be set aside.

6. The learned counsel for the respondent, on the other hand, submitted that the arbitrator has examined all the documents and has considered the submissions made by the parties and after hearing the

counsel for the parties, come to definite conclusions and findings. One of the findings was that the fourth/final bill prepared by the EE/MCD showed that the work was in progress. This, according to the learned counsel for the respondent, was a definite finding and should not be interfered with by this Court while considering a petition under Section 34 of the said Act. She submitted that the Court, while considering such a petition, does not sit as a Court of appeal and cannot re-appreciate finding of fact nor can it substitute its own views in place of the arbitrator's. The learned counsel then referred to the decision of the Supreme Court in the case of ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd: 2003 (5) SCC 705.*** She referred to the following passage:-

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar[1] case it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:
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> (a) fundamental policy of Indian law; or

1 1994 Supp (1) SCC 644

(b) the interest of India; or
(c) justice or morality, or
(d) in addition, if it is patently illegal.

> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

Reading the above passage from the said decision of the Supreme Court she submitted that it is only in the case of patent illegality which went to the root of the matters that the Court could interfere under Section 34 of the said Act. If the illegality was of a trivial nature then the award could not be held to be opposed to public policy and no interference would be called for. She also submitted that the award could also be set aside if it was so unfair and unreasonable that it shocked the conscience of the Court. Going through the award she submitted that this was not an award which would shock the conscience of the Court and would be so unreasonable or unfair so as to raise such a presumption. Accordingly, she submitted that the award does not call for any interference.

7. I have considered the arguments advanced by the learned counsel for the parties. Insofar as claim No.2 is concerned, the key

question is whether the work was completed on 4.3.2002 or not? Unfortunately, the arbitrator has not returned any finding as to when the work was completed. This, he ought to have done inasmuch as he was of the view that the work was not completed on 4.3.2002 as claimed by the petitioner. It is an admitted position that the documents marked as Ext. P-6, P-7 and P-8 were received by the respondent. It is important to note that Ext. P-6 is a letter dated 18.6.2002 issued by the petitioner to the respondent. In that letter it has been stated more than once that the work had been completed to the satisfaction of the respondent one month ahead of schedule. The letter also states that despite the completion of the work, the incentive bonus of 1% was not being paid nor was the final bill being cleared. Since this letter is very important, it would be instructive to reproduce the contents thereof. The same reads as under:-

> "The above mentioned work was awarded to us and the date of start as per the Agreement the date of start was 27.9.2001 and the stipulated date of completion was 4.6.2002. We completed the work to the entire satisfaction one month ahead of schedule. Under the agreement the contractor was entitled to an incentive of 1% of the contract in case the work is completed one month ahead of schedule. It is regretted that despite the fact that the work has been completed neither our final bill nor the payment towards the incentive has been made to us. Please note that we will charge interest @ 24% compounded quarterly for all our delayed payments and damages.
>
> You were requested to take over the toilet block

so that our watch and ward can be removed. We are incurring huge amount towards the watch and ward and other liabilities and we request you to kindly take over the toilet block.

Though our work has been completed on 4.3.2002, but till date you are not taking over the watch and ward. By means of this letter we call upon you to take over the watch and ward, failing which we will not be responsible any theft, pilferage etc."

This letter clearly brings out the following:-

(1) The petitioner had notified the respondent that the work had been completed on 4.3.2002;

(2) The petitioner claimed incentive of 1% for completing the work one month ahead of schedule;

(3) The petitioner claimed payment of the final bill;

(4) The petitioner also claimed interest @ 24% compounded quarterly in respect of delayed payments;

(5) The petitioner was incurring huge amount towards the watch and ward staff and other liabilities;

(6) The petitioner requested the respondent to take over the sites so that the petitioner's responsibility of maintaining a watch and ward staff is brought to an end.

8. This letter was followed by the letter dated 2.8.2002 wherein it was reiterated that the work had been completed on 4.3.2002, but the respondent had not taken over the watch and ward. A similar letter (Ext. P-8) was written on 15.10.2002. By the last letter the petitioner had

given notice to the respondent that the petitioner would be removing the watch and ward staff on 30.10.2002. These letters do indicate that the petitioner had informed the respondent that the work had been completed on 4.3.2002. The respondent also admitted the receipt of these letters and there is nothing on record to show that there was any response from the respondent denying the fact that the work had been completed on 4.3.2002. These letters, unfortunately, have been ignored by the learned arbitrator and have not been given due weightage. Therefore, the award of the learned arbitrator in respect of claim No.2 cannot be sustained. It would definitely be against public policy of India inasmuch as the findings have been arrived at by ignoring material documents.

9. Insofar as claim No. 4 is concerned, the award in respect of this is also required to be set aside because of the reasons given for claim No.2. The very same letters, i.e. Exts P-6, P-7 and P-8 have been ignored. Similarly, the award in respect of claim No. 6 to the extent of pre-suit interest also deserves to be set aside because the arbitrator has not considered Ext. P-6 where a claim of interest had clearly been made. The arbitrator, as pointed out above, has mentioned that the claimant had, at no occasion, given any written notice to the respondent about claiming

interest on the due amount. This conclusion of the arbitrator is clearly contrary to the record and is a patently erroneous finding which does go to the root of the matter. Accordingly, the award in respect of claim No.6 with respect to rejection of the claim for pre-suit interest is also set aside.

9. The conclusion, therefore, is that the award in respect of claim No.2, claim No. 4 and claim No. 6 to the extent of the rejection of the pre-suit interest is set aside. The same is referred for arbitration afresh to be conducted by Mr S.P. Rai, R/o A-2/12, Sector-5, Rohini, Delhi-85. The parties shall appear before the said arbitrator on 30.10.2007 at 4.30 p.m. The rest of the award stands satisfied.

10. The records of the arbitrator be made available to the newly appointed arbitrator. This petition stands allowed to the extent indicated above.

BADAR DURREZ AHMED
(JUDGE)

September 27, 2007
J